SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39

----------X

JAMES ROUGAN,

Plaintiff,

-against- Index No. 652478/16

CUSHMAN & WAKEFIELD, INC.,

Defendant.

----------X

SALIANN SCARPULLA, J.:

In this action, plaintiff James Rougan ("Rougan"), a real estate broker, alleges that defendant Cushman & Wakefield, Inc. ("C&W") breached Rougan's employment contract and violated the New York Labor Law by failing to pay him a million dollar commission on a real estate deal involving Amazon, the e-commerce retailer, and by arbitrarily giving the entire commission to another broker who partnered with Rougan on the assignment.

C&W now moves, pursuant to CPLR 3211 (a) (7), for dismissal of the first and second causes of action of the amended verified complaint.

Rougan began his employment with C&W as a "real estate broker/salesperson" on February 17, 1998, through a written Broker-Salesperson Employment Contract and U.S. Standard Schedule of Compensation for Brokerage and Sales Personnel (updated as of January 1, 2013) (together, the Contract) (complaint, ¶ 2). Rougan alleges that he performed work on a real estate deal that resulted in Amazon leasing a building at 7 West

34th Street (the Amazon deal) (*id.*, ¶ 2), and that he is entitled to a commission under the Contract and the incorporated schedule of compensation (*id.*, ¶¶ 3, 11-13). Paragraph 3 of the Contract obliges C&W to "pay [Rougan] . . . the percentage of the commissions and fees collected by C&W on transactions in which [Rougan] has rendered services, under the circumstance and as determined in accordance with the Schedule of Compensation annexed hereto and made part hereof" (*id.*, ¶ 12; *see* exhibit A).

However, paragraph 7 of the Contract expressly provides that C&W has "sole discretion" to decide whether a deal is "consummated in whole or in part by [Rougan's] efforts" (*id.*, ¶ 14; *see* exhibit A]). The Contract also expressly provides that C&W has the contractual right to determine the "amount of and the allocation of" Rougan's share of the commission if other employees contributed to or assisted in consummating the deal, and that Rougan "shall abide by and accept C&W's decision" (*id.*). Rougan asserts that, in exercising this discretion, C&W is bound by the covenant of good faith and fair dealing implicit in every contract, and that the covenant prohibits C&W from exercising this discretion in an arbitrary or irrational manner (*id.*, ¶ 16).

Rougan alleges that, in December 2011, Jeffrey Heller ("Heller"), a commercial real estate broker also employed by C&W, approached him about assisting with securing appropriate space for Amazon to lease in New York City. Rougan further alleges that he and Heller specifically agreed that they would split the broker portion of the commission for the transactions they worked on together for Amazon on a 50/50 basis both for this first deal, and for any future deals (*id.*, ¶¶ 22-23).

When the first Amazon deal was completed, Rougan and Heller split the commission 50/50 (*id.*, ¶ 28). The second Amazon deal did not close (*id.*, ¶ 40). The third Amazon deal that Heller and Rougan allegedly worked on together resulted in Amazon leasing 7 West 34th Street (*id.*, ¶ 50). Rougan alleges that Heller refused to share the commission for this deal with him, and that Rougan approached C&W management to resolve the dispute (*id.*, ¶ 52). Rougan further alleges that C&W refused to contact representatives from the landlord and Amazon to confirm Rougan's substantial involvement in the Amazon deal (*id.*, ¶¶ 63-64), and refused to allow Rougan to utilize the company's internal arbitration process (*id.*, ¶¶ 65-66). Rougan alleges that, instead, C&W arbitrarily determined that 100% of the broker commission should go to Heller (*id.*, ¶ 68).

Rougan then sued C&W for, among other things, breach of contract and unpaid wages under New York Labor Law. C&W moves to dismiss these two causes of action.

Discussion

Although on a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), "the pleading is to be afforded a liberal construction," and "the facts as alleged in the complaint [are presumed] as true" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]; *see also Rovello v Orofino Realty Co.*, 40 NY2d 633 [1976]), "'factual claims [that are] either inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration'" (*Mark Hampton, Inc. v Bergreen*, 173 AD2d 220, 220 [1st Dept 1991] [citation omitted]; *see also Caniglia v Chicago Tribune-N.Y. News Syndicate*, 204

AD2d 233, 233-234 [1st Dept 1994]). Motions to dismiss are properly granted where a defense is conclusively established by documentary evidence (*Held v Kaufman*, 91 NY2d 425, 431 [1998]). On a motion to dismiss, the court may consider the facts alleged in the complaint, documents attached as exhibits, and matters incorporated or made a part thereof (*see Quatrochi v Citibank,* 210 AD2d 53, 53 [1st Dept 1994]).

Construing the complaint in a light most favorable to Rougan, both the facts alleged in the complaint and the undisputed documentary evidence compel dismissal of the first and second causes of action. Rougan cannot state a claim for breach of contract because the express language in the Contract broadly permits C&W to exercise its discretion in determining commission allocation, the Contract binds Rougan to C&W's decisions, and C&W determined that Rougan was not entitled to a commission. Additionally, Rougan's Labor Law claim for unpaid wages fails due to its complete reliance on Rougan's insufficient breach of contract claim.

Breach of Contract (First Cause of Action)

In his breach of contract claim, Rougan alleges that C&W "has breached the Employment Contract by unilaterally and irrationally failing to pay a brokerage commission due and owing to [Rougan]" (complaint, ¶ 83).

Rougan's claim that C&W's failure to pay him a portion of the commission for the Amazon deal constitutes breach of contract is belied by the unambiguous terms of the Contract. That agreement gave C&W the express contractual right solely to decide whether Rougan was entitled to any commission at all on the Amazon deal by

determining whether the deal was consummated, in whole or in part, by Rougan's efforts (Contract, ¶ 7). The express language of the Contract further provided that C&W had the final decision-making authority to determine the "amount" and "allocation" of any shared commissions on the Amazon deal (*id.*).

C&W acted in accordance with the express provision of the Contract in determining that the Amazon deal was not "consummated in whole or in part by [Rougan's] efforts." Further, Rougan was expressly bound to "abide by and accept" C&W's decision to pay 100% of the Amazon deal commission to the broker-salesperson who C&W determined had consummated the Amazon deal.[1]

In opposition, Rougan argues that, in addition to refusing to pay him his portion of the Amazon commission, C&W also breached the Contract by refusing to allow him to

---

[1] Dismissal of Rougan's breach of contract claim under New York law is squarely supported by the cases that dismiss breach of contract claims against employers for their alleged failure to pay bonuses. In those cases, as here, the employee is bound by the employer's contractual decision to award or not award compensation, because the agreements or policies setting forth the employment terms give the employer discretion to so decide.

For example, in *O'Grady v BlueCrest Capital Mgt. LLP* (111 F Supp 3d 494 [SD NY 2015], *affd* 646 Fed Appx 2 [2d Cir 2016]), the Court held that because the express language of the employment agreement gave the defendant "sole and absolute discretion" to make bonus awards, and the defendant decided not to award the plaintiff a bonus, the plaintiff was not entitled to any bonus pursuant the agreement's plain language (*id.* at 501); *see also Smalley v Dreyfus Corp.*, 40 AD3d 99, 106 [1st Dept 2007 *revd on other grounds* 10 NY3d 55 [2008] [dismissing breach of contract claim where the employer's incentive compensation plan gave the employer sole discretion to "modify or annul any individual award" as well as "complete discretion" over the "making, payment and amount of all awards"]; *Kaplan v Capital Co. of Am., LLC*, 298 AD2d 110, 111 [1st Dept 2002] [breach of contract claim dismissed because the company's handbook provided that bonuses were "paid solely at the company's discretion"]).

use C&W's internal arbitration procedure to decide the broker dispute over the Amazon commission. Here again, this claim is untenable under the express terms of the Contract.

Section VI of the Schedule of Compensation states that "C&W's then current published U.S. Internal Commission Dispute Arbitration Policy shall govern all disputes between brokers that cannot be resolved by the parties in good faith *and where C&W does not elect to exercise its right under the applicable employment/engagement agreements with such brokers to decide such dispute*. (Emphasis added) Thus, the arbitration provision applies only in instances where "C&W does not elect to exercise its right" to decide the dispute, and here C&W plainly exercised that right. Consequently under the unambiguous provisions of Section VI, the arbitration policy was never triggered.

Rougan also argues that C&W breached the implied covenant of good faith and fair dealing that exists in every contract, both by denying Rougan a commission for the Amazon deal, and by refusing to allow Rougan's broker dispute to be submitted to internal arbitration. While it is true that every contract in New York contains an implied covenant of good faith and fair dealing, this obligation does not prevent a court from dismissing a breach of contract claim that is expressly contravened by a contract's terms. The law is clear that "no obligation can be implied that 'would be inconsistent with other terms of the contractual relationship'" (*Dalton v Educational Serv.*, 87 NY2d 384, 389 [1995] [citation omitted]). Here, because the parties agreed that C&W had broad and conclusive discretion to determine whether Rougan should receive part of the Amazon

brokerage commission, C&W's exercise of that contractual right can not be a breach of the covenant of good faith and fair dealing.

Rougan's claim for breach of the implied covenant of good faith and fair dealing also fails because it is entirely duplicative of Rougan's breach of contract claim. *See TeeVee Toons, Inc. v Prudential Sec. Credit Corp., L.L.C.*, 8 AD3d 134, 134 [1st Dept 2004] [affirming dismissal of claim for breach of the implied covenant of good faith because it was "redundant" of breach of contract claim]; *Triton Partners v Prudential Sec.*, 301 AD2d 411, 411 [1st Dept 2003] [same]). A breach of the implied covenant of good faith can only survive a motion to dismiss if it is based on allegations different than those underlying the accompanying breach of contract claim (*see Tag 380 LLC v ComMet 380, Inc.*, 40 AD3d 1, 8 [1st Dept 2007], *affd as modified* 10 NY3d 507 [2008]; *Pier 59 Studios L.P. v Chelsea Piers L.P.*, 27 AD3d 217, 218 [1st Dept 2006]).

A claim for breach of the implied covenant of good faith and fair dealing is duplicative of a breach of contract claim where both claims arise from the same set of facts, and seek identical damages (*see Havell Capital Enhanced Mun. Income Fund, L.P. v Citibank, N.A.*, 84 AD3d 588, 588 [1st Dept 2011] [affirming dismissal of breach of the implied covenant of good faith and fair dealing claim that "arose from the same facts and sought identical damages, [and] was duplicative of the contract claim"]; *2470 Cadillac Resources, Inc. v DHL Express (USA), Inc.*, 84 AD3d 697, 698 [1st Dept 2011] ["The third cause of action, for breach of the implied covenant of good faith and fair dealing, is

duplicative of the breach of contract cause of action since it is based on the same facts as are alleged in support of that cause of action"]).

Rougan's claim for breach of the implied covenant of good faith and fair dealing, which is first asserted in his opposition papers, is based on the same facts as those alleged in support of Rougan's breach of contract claims – that C&W refused to pay him his portion of the commission, or to allow Rougan to utilize C&W's internal arbitration procedure (*see* complaint, ¶¶ 65-66; opposition memorandum at 1-3, 6, 8). Significantly, Rougan seeks identical damages for breach of contract and for breach of the implied covenant of good faith and fair dealing (*see* complaint, ¶¶ 80-91).

As C&W acted in accordance with the express provisions of the Contract in allocating 100% of the Amazon deal commission to the broker-salesperson who C&W determined had consummated the Amazon deal, Rougan's breach of contract claim for failure to pay Rougan his portion of the commission for the Amazon deal fails on the express language of the contract.

Further, Rougan's claim for breach of the implied covenant of good faith and fair dealing is inconsistent with the terms of the Contract and "duplicative of the [underlying] cause of action for breach of contract," and must also be dismissed (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 320 [1995]).

Labor Law Claim (Second Cause of Action)

In his second cause of action, Rougan alleges that he is an employee of C&W, as defined in Labor Law § 190 (2), and that the brokerage commission and attendant non-

discretionary bonus monies owed by C&W to Rougan are "wages" within the meaning of Labor Law § 190 (1) (complaint, ¶¶ 93-94). Rougan further alleges that, in violation of Labor Law §§ 191 and 193, C&W "has knowingly failed to pay Rougan his earned commission and attendant non-discretionary bonus income in accordance with the agreed upon terms of their employment agreement" (*id.*, ¶ 96).

To assert his Labor Law claim for unpaid wages, Rougan relies entirely on his allegation that C&W failed to pay him commission on the Amazon deal pursuant to the Contract (*see id.*, ¶ 96). Because Rougan has failed to state a claim for breach of contract, his Labor Law claims must also be dismissed (*see O'Grady*, 11 F Supp 3d at 505 ["Since O'Grady has no enforceable contractual right to a bonus award, he cannot state a claim pursuant to section 193 (of the Labor Law)"]; *Tierney v Capricorn Invs., L.P.*, 189 AD2d 629, 632 [1st Dept 1993] [dismissing Labor Law § 190 claim because the plaintiff had no enforceable contractual right to the wages at issue]).

Although Rougan contends that New York has a strong public policy against forfeiture of wages, this public policy does not apply to unearned commissions, as employers are prohibited only from withholding "earned wages" or "earned commissions." The express language in the Contract unambiguously shows that Rougan did not earn the commission at issue because the conditions established by the Contract were not met.

I have considered the remaining arguments, and find them to be without merit.

Accordingly, it is

ORDERED that C&W's motion to dismiss Rougan's first and second causes of action of the amended verified complaint is granted; and it is further

ORDERED that C&W is directed to serve an answer to the remainder of the amended verified complaint within 20 days of service of a copy of this order with notice of entry.

Dated: July 13, 2017

ENTER: